ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Calling Party Pays Service Offering in the Commercial Mobile Radio Services	)	WT Docket No. 97-207

To: The Commission

OPPOSITION OF AIRTOUCH COMMUNICATIONS, INC.

Pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), AirTouch Communications, Inc. ("AirTouch") hereby files comments in opposition to the "Petition for Reconsideration and Clarification and Further Comments on Jurisdictional Issues" (the "Petition") submitted by the Public Utilities Commission of Ohio ("Ohio PUC") in the above-referenced proceeding. The Ohio PUC seeks reconsideration primarily of the *Declaratory Ruling* in which the Commission determined that Calling Party Pays ("CPP") services provided by commercial mobile radio service ("CMRS") providers constitute CMRS services.[1] For the reasons discussed herein, the Commission appropriately determined that CPP is a CMRS service and the remaining jurisdictional issues raised by the Ohio PUC are properly addressed in the context of the *NPRM* in this proceeding. Accordingly, the Ohio PUC Petition should be denied.

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[1] *See Calling Party Pays Service Offering in the Commercial Mobile Radio Services, Declaratory Ruling and Notice of Proposed Rulemaking*, WT Docket No. 97-207, FCC 99-137 (rel. July 7, 1999), 64 Fed. Reg. 38313, 64 Fed. Reg. 38396 (July 16, 1999) ("*Declaratory Ruling*" or "*NPRM*" as applicable), *recon. pending*, 64 Fed. Reg. 50509 (Sept. 17, 1999).

BACKGROUND/INTRODUCTION

The Commission should affirm its conclusion that CPP is a CMRS service subject to Section 332(c)(3)(A) preemption. AirTouch and numerous other parties, in earlier comments responding to the *CTIA Public Notice,*[2] demonstrated that "CPP qualifies as a CMRS service offering regardless of which carrier provides the billing and collection service" and that "the identity of the party charged does not change the nature of the underlying communications service."[3] In its comments on the *CTIA Public Notice*, however, the Ohio PUC argued that Section 332 does not confer exclusive CPP jurisdiction with the Commission; that CPP is "a rate issue for landline LEC customers, not CMRS customers;" and that "CPP directly affects the rates paid by landline customers for calls that are local in nature."[4] The Ohio PUC also asserted that CPP issues are "billing issues reserved for State jurisdiction."[5]

In the *Declaratory Ruling*, the Commission addressed the Ohio PUC's arguments that CPP is not CMRS and rejected them. The Commission also expressly addressed -- and

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[2] Public Notice, Petition for Expedited Consideration Filed, WT Docket No. 97-207, DA 98-468 (rel. March 9, 1998) ("*CTIA Public Notice*"). In the *CTIA Public Notice,* the Commission sought further comment on a Petition for Expedited Clarification submitted by CTIA arguing that "[t]he record in this proceeding demonstrates that the Commission may assert its exclusive jurisdiction over the implementation of CPP." *See* Petition for Expedited Consideration of the Cellular Telecommunications Industry Association in WT Docket No. 97-207, filed Feb. 23, 1998, at 5.

[3] *See, e.g.*, Comments of AirTouch Communications, Inc. in WT Docket No. 97-207, filed May 8, 1998, at 4; Comments of Bell Atlantic in WT Docket No. 97-207, filed May 8, 1998, at 3; Comments of Omnipoint Communications in WT Docket No. 97-207, filed May 8, 1998, at 6; Comments of the Rural Telecommunications Group in WT Docket No. 97-207, filed May 8, 1998, at 4-7; Reply Comments of CTIA in WT Docket No. 97-207, filed June 8, 1998, at 9-11.

[4] Comments of the Public Utilities Commission of Ohio in WT Docket No. 97-207, filed May 8, 1998, at 3-4.

[5] *Id.* at 4.

rejected -- the Ohio PUC's arguments that CPP is a billing service subject to state regulation pursuant to the "other terms and conditions" provision of Section 332(c)(3).[6] The Ohio PUC now asserts that the Commission has "misapprehend[ed]" Section 332 and that further clarification of the Commission's position is necessary. The Ohio PUC, however, largely resurrects arguments on reconsideration that the Commission has already addressed and rejected. As discussed herein, the Ohio PUC's attempt to circumvent the Commission's straightforward statutory interpretation is unconvincing and its Petition should be denied.

DISCUSSION

I. THE COMMISSION SHOULD AFFIRM ITS DETERMINATION THAT CPP IS A CMRS SERVICE

The Ohio PUC asserts that CPP is not a CMRS service. In support of this assertion, the Ohio PUC makes certain conclusions regarding (1) the functioning of CMRS and ILEC networks under CPP; (2) privity of contract between a wireline caller and CMRS CPP customer; and (3) whether CPP is an interconnected service. The Ohio PUC's conclusions are in some cases wrong and, in other cases, irrelevant to the Commission's analysis of this issue.

A. The Ohio PUC's Conclusions Regarding the Functioning of CPP Calls and Privity of Contract Are Inconsistent with a Plain Reading of the Communications Act

In the *Declaratory Ruling*, the Commission appropriately determined that CPP offerings are a mobile service, regardless of whether the call originates from a wireline phone or mobile station. The Ohio PUC dismisses the Commission's conclusion, claiming first that "[t]he

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[6] *See Declaratory Ruling* ¶¶ 18-19.

wireline and cellular networks will function the same way under CPP as they do today."[7] The Commission demonstrated in the *Declaratory Ruling*, however, that Congress itself has expressly defined "commercial mobile services" such that CPP falls within that definition.[8] As the Commission further explains:

> [T]he calling party, whether from a land or mobile station, would be seeking to use radio spectrum and related wireless network facilities to transmit writing, signs, pictures and sounds to a mobile station. . . . There is no reference in the statutory [CMRS] definition to who pays for the call, and no suggestion that CPP, which would satisfy all requirements of the definition, should be excluded because the calling party pays the airtime charges."[9]

It is well-established that the Commission's construction of its enabling statute[10] and its own rules[11] is entitled to considerable deference. A straightforward application of the Communications Act and the Commission's rules supports the Commission's construction that it

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[7] Petition at 7-8. The Ohio PUC also dismisses the Commission's distinction between CPP and "CPP-like" services. The Ohio PUC has failed to acknowledge, however, that under CPP the wireline subscriber pays the *airtime* charges of the CMRS carrier, not the rates of the landline customer.

[8] *Declaratory Ruling* ¶¶ 15-16.

[9] *Id.* ¶¶ 16-17.

[10] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). That decision provides that: "first, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 844. *See also Department of the Treasury, Internal Revenue Service v. FLRA*, 494 U.S. 922, 933 (1990); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 535 (8th Cir. 1998); *Southern California Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997).

[11] *See Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531, 1536 (D.C. Cir. 1994) ("agency's interpretation should be upheld unless it is 'plainly erroneous or inconsistent with the regulation'" citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (same).

is the mobile and radio components of a CPP call, not the origination of the call or identity of the caller (as the Ohio PUC argues), that renders it a "commercial mobile service" for purposes of the Communications Act. Unless the Ohio PUC can demonstrate that the Commission's interpretation of Section 332(c)(3) is "arbitrary, capricious, or manifestly contrary to the statute," the Commission should affirm the *Declaratory Ruling*.[12] The Ohio PUC clearly has not met this burden.[13]

The Ohio PUC also makes much of the fact that a *LEC's* customer will often originate CPP calls. The Commission, however, has expressly noted that there already are instances in the carrier-caller context in which the calling party is not required to establish an account, or presubscribe with another carrier, to be deemed a "customer."[14] Thus there is ample authority for the Commission's conclusion that a customer's informed choice to complete a CPP call is sufficient to establish a binding contractual obligation. The fact that "[t]he calling party is still legally the customer of the originating carrier," while true, does not undermine the Commission's determination.

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[12] *Chevron,* 467 U.S. at 843-44.

[13] *See Sta-Home Home Health Agency, Inc. v. Shalala*, 34 F.3d 305, 309 (5th Cir. 1994) (quoting *Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 325 (5th Cir. 1984)).

[14] *Declaratory Ruling* ¶ 17 (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 12 FCC Rcd. 15014, 15026-27, n.74 (1997) ("*Casual Calling Reconsideration Order*")); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd. 20730, ¶ 58, n.169 (1996) (discussing implied-in-fact contract theory where a customer has used the carrier's services, with knowledge of the carrier's charges, but has not executed a written contract, citing Richard A. Lord, WILLISTON ON CONTRACTS, ¶6:43 at 467-469 (4th ed 1991), *NLRB v. Local 825, Int'l Union of Operating Engineers*, 315 F.2d 695, 699 (3d Cir 1963), *Seaview Ass'n of Fire Island, N.Y., Inc. v. Williams*, 517 N.Y.S.2d 709 (1987), and *Watts v. Columbia Artists Management*, Inc., 591 N.Y.S.2d 234, 237 (App. Div. 1992)).

B. The Commission Should Reject the Ohio PUC's Argument that CPP Is Not An "Interconnected Service"

The Ohio PUC asserts that CPP is not an "interconnected service" on the basis that it "does not 'give subscribers the capability to communicate to or receive communications from all other users on the public switched network.'" The Ohio PUC reasons that "CPP customers cannot receive any call from any person on the public switched network, unless the caller affirmatively establishes a contractual relationship with the CPP customer's CMRS provider" and that if the caller refuses to become a customer of that CMRS provider, then "the CPP customer is unable to receive a call from the public switched network."[15]

As the Commission explained, CPP is an "interconnected service" because "a calling party would be sending a message over the 'public switched network,' as those terms are defined by the regulation, to reach the mobile phone of the CMRS subscriber."[16] A review of the Commission rules supports this determination. The Commission's rules define "interconnected service" as follows:

> A service: (a) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or (b) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 USC §332(c)(1)(B).[17]

"Interconnected," in turn, is defined as "[d]irect or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit

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15 Petition at 9.

16 *Declaratory Ruling* ¶ 16.

17 47 C.F.R. § 20.3.

the transmission or reception of messages or signals to or from points in the public switched network."[18]

The Ohio PUC cannot fairly maintain that a CMRS provider offering CPP service is not "interconnected" to the public switched network. Under the Ohio PUC's reasoning, whether CPP is an "interconnected service" depends ultimately on an end user wireline customer's decision to complete a call. This makes no sense.[19] In adopting these definitions, the Commission expressly addressed -- and rejected -- arguments that the definition of "interconnected service" should include a requirement that an *end user* have "the ability to control directly access to the public switched network for purposes of sending or receiving messages to or from points on the network."[20] As the Commission noted:

> Neither the statute nor the legislative history uses the term "end user control." We believe that it would be infeasible for end users, in any literal sense, to control directly access to the public switched network for sending or receiving messages to or from points on the network. . . . If Congress was concerned about end user or subscriber control of access to the network, it would not have included in the definition of interconnected service those services awaiting Commission response to interconnection requests.[21]

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[18] *Id.*

[19] Indeed, this would be akin to a claim that payphones are not "interconnected" because the customer has to decide whether or not to deposit a coin.

[20] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1432 ¶ 51 (1994).

[21] *Id.* at 1434 ¶¶ 54-55. The Commission also clarified that "[i]n defining interconnected service in terms of transmissions to or from 'anywhere' on the PSN, we note that it is necessary to qualify the scope of the term 'anywhere'; if a service that provides general access to points on the PSN also restricts calling in certain limited ways (e.g., calls attempted to be made by the subscriber to '900' telephone numbers are blocked), then it is our intention still to include such a service within the definition of 'interconnected service' for purposes of our part 20 rules." *Id.* at 1434-35 ¶ 55 n.104. Thus, unfettered access to the public switched network is not necessary to

(continued...)

Thus, whether or not an end user calling party opts to complete a call to a CMRS CPP subscriber is irrelevant. The Commission should reject the Ohio PUC's attempt to resurrect the notion of end user control as a relevant factor in determining whether a service is interconnected to the public switched network.

II. REMAINING ISSUES RAISED BY THE OHIO PUC SHOULD BE ADDRESSED IN THE CONTEXT OF THE *NOTICE OF PROPOSED RULEMAKING*

In its Petition, the Ohio PUC also discusses various jurisdictional issues associated with the *NPRM*. After discussing Section 332(c)(A)'s statutory provisions and legislative history, the Ohio PUC asserts that "[t]here is absolutely no basis to conclude that the FCC has exclusive jurisdiction over CMRS services" and that "the FCC should not entertain any notions of concluding that the consumer regulations being discussed in this docket amount to 'rate regulation.'"[22] This issue, however, is appropriately addressed in the context of the *NPRM* -- not the Ohio PUC's petition for reconsideration.

Further, and far from "unilaterally amend[ing] Section 332," the Commission in the *NPRM* has expressly acknowledged states' "other terms and conditions" authority.[23] As AirTouch discusses in its comments, while there likely will be areas of CPP regulation where concurrent jurisdiction is feasible, there will also likely be implementation issues necessitating preemption -- *independent* of Section 332 -- where interstate and intrastate regulation is

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[21] (...continued)
be deemed an interconnected service.

[22] Petition at 11-13.

[23] *NPRM* ¶¶ 34, 37; *see* Petition at 11.

impossible.[24] Moreover, given the record already submitted in this proceeding, and the record developing in response to the *NPRM*, it is simply wrong or, at minimum premature, to conclude (as the Ohio PUC has done) that "there is no legal basis in this docket . . . to characterize CPP consumer regulations as rate regulation."[25] The Ohio PUC, as well as carriers and other interested parties, have participated in the *NPRM* proceeding; the Commission should base its conclusions on these issues on the record submitted therein.

CONCLUSION

For the foregoing reasons, the Commission should affirm its earlier determination that CPP is a CMRS service for purposes of the Commission's rules and the Communications

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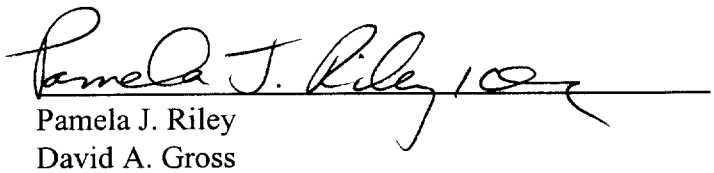
[24] As AirTouch noted in its comments responding to the *NPRM*, certain limited state regulation of notification or other information might constitute "other terms and conditions" of CMRS service, thus affording states concurrent jurisdiction. *See* Comments of AirTouch Communications, Inc. in WT Docket No. 97-207, filed Sept. 17, 1999, at 51, 56. While AirTouch believes that states should be preempted from requiring specific notification requirements beyond the elements required in federal guidelines, all state consumer protection activity with respect to CPP CMRS services is not necessarily preempted and, in some cases, moreover, preemption could be narrowly tailored. *See id.* at 55-56.

[25] Petition at 16. The means by which rates are publicized, whether by tariff or otherwise, is a traditional aspect of rate regulation. As the Commission noted in the *NPRM*, "a key objective of CPP notification is to provide the caller with information about the rates, terms, and conditions of the CPP call so that the caller can make an informed decision whether to complete the call." *NPRM* ¶ 36 n.86 (citing *AT&T v. Central Office Tel.*, 118 S.Ct. 1956, 1963 (1998) for the proposition that rates do not exist in isolation, and have meaning only when one knows the services to which they are attached).

Act, and should address the remaining jurisdictional issues raised in the Ohio PUC's Petition in the context of the *NPRM* in this proceeding.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.

By: 

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